FEB 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1314

WILLIAM GREEN CONSTRUCTION CO., INC.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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v.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

William Green Construction Company, Inc., (hereafter referred to as "Green") and United States Fidelity and Guaranty Company (hereafter referred to as "USF&G") cross-petition for a writ of certiorari to review the judgment of the United States Court of Claims in this case. This cross-petition is conditional upon the granting of the petition for writ of certiorari filed by the Government in this case on January 26, 1974 (No. 73-1153). Green and USF&G

have filed a brief in opposition to that petition, and in the event that petition is denied, they shall seek dismissal of this petition.

OPINION BELOW

The opinion of the Court of Claims is reported at 477 F.2d 930. The Court of Claims' Order denying the motions of the parties for reconsideration is unreported. For convenient reference, petitioners' complaint is attached to this cross-petition (App. I, *infra,* pp. 1a-16a).

JURISDICTION

The opinion of the Court of Claims was entered on May 11, 1973, and the respective motions for reconsideration were denied on September 28, 1973. On January 3, 1974, the Chief Justice extended the time within which to file a cross-petition for a writ of certiorari to February 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

The questions presented are:

1. Whether, in view of Green's administrative appeal from the termination of the Howard University contract and the Board of Contract Appeals' dismissal of the breach of contract portion of that appeal, the Court of Claims erred in requiring Green to return to the Board of Contract Appeals for exhaustion of administrative remedies.

2. Whether a breach of the payments clause by the Government is cognizable under the disputes clause of the contract thereby requiring all issues of

liability and damage to be determined administratively?

3. Whether a termination for convenience clause or concept can be employed to exculpate the Government from the full extent of the damages it has wrongly imposed where the contractor (1) was not in default and (2) where the Government desires or needs completion of the contracted-for facilities?

(4) Whether the damages alleged in the Petition are, as a matter of law, nonrecoverable, notwithstanding that such damages are provable and notwithstanding that the Government had actual knowledge that such damages would be the inevitable result of its wrongful acts and, in spite of that knowledge, arbitrarily proceeded with such wrongful action?

(5) Whether the Government's general right of set-off entitles the Government to set-off nonmeritorious claims arising out of the Government's own wrongful conduct, without responsibility for the consequences of the unjustified set-off?

STATUTE INVOLVED

The Wunderlich Act, 68 Stat. 81, 41 U.S.C. §§ 321-322, provides as follows:

> § 321. Limitation on pleading contract-provisions relating to finality; standards of review.
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review

of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

STATEMENT

Petitioners in this action seek damages for losses directly caused by the Government's breach of contracts entered into with Green. USF&G was the surety on the performance and payment bonds on two of these contracts.

The facts pertinent to the issues are set forth in the petition initiating this action and, of course, those facts must be accepted as true for purposes of a motion to dismiss which the Government filed in the Court of Claims and on which that Court rendered its opinion in this case. Briefly stated, the facts are: In November 1964, the Government and Green entered into a contract in the amount of $1,899,138 for the construction of a women's residence hall at Howard University in Washington, D. C. (hereafter referred to as the "Howard contract"). At approximately the same time, these parties also entered into a contract in the amount of $2,340,583 for the construction of a United States Post Office and Federal

Office Building in Portsmouth, New Hampshire (hereafter the "FOB contract"). Subsequently, these parties signed a third contract in the amount of $8,556,150 for the construction of the National Training School for Boys in Morgantown, West Virginia (hereafter the "Training School contract"). USF&G was the surety on the Howard University and FOB contracts.

After award of the contract and for 16 months thereafter, Green attempted to perform the Howard contract but was unable to make substantial progress because the plans and specifications for the cast-in-place architectural concrete (CPAC) work, which was critical to performance of the contract, were defective and impossible to perform. Green made repeated requests of the Government during this time for changes in the plans and specifications to permit the work to proceed, but these requests were rejected even though the Government had a duty under law to make the changes necessary to permit the work to proceed if they were defective. The Government disagreed that its plans and specifications were defective, and by letter of April 14, 1966, its contracting officer advised Green that its right to proceed with the Howard University contract was thereby terminated for default on the ground that Green had failed to proceed in accordance with that contract. Green had been able to complete only 13.5% of the contract work during the preceeding 16 months. Green filed a timely appeal from the default termination with the General Services Board of Contract Appeals (GSBCA).

The Government almost immediately advised Green that it was going to set-off all of its contin-

gent claims for damages, liquidated and unliquidated, arising from the Howard termination, against progress payments earned by petitioner Green on the FOB and Training School contracts. This was a surprising position for the Government to take and obviously one with far reaching implications because:

1. The Government was already secure from any potential loss on Howard. It was holding contract balances of about $1,640,000 and a performance bond of $1,899,138 with USF&G as surety, providing total security of $3,539,138 to assure completion of the Howard contract, if it could be performed at all in accordance with the plans and specifications.

2. Green did not have the capital resources to continue performing contracts of the magnitude of FOB ($2,340,583) and Training School ($8,556,150) without the benefit of unimpaired progress payments. It already had contracted for all the materials, equipment and labor necessary to perform the $12,795,871 in work represented by the Howard, FOB and Training School contracts, and those obligations which were in the millions of dollars had to be satisfied regardless of whether the Government paid Green. Moreover, the major part of Green's business was involved with these three contracts and the lack of progress payments on FOB and Training School contracts meant the destruction of Green's business because of the very large contractual commitments that it had made with materialmen and subcontractors for the performance of work required by the contracts with the Government.

3. The FOB and Training School contracts were being satisfactorily performed by Green and it was

inconceivable that the Government (i) would knowingly commit an act damaging to its own interest by causing an unnecessary default of the FOB and Training School contracts with their attendant delays and added costs, and (ii) would knowingly commit an act that meant the destruction of Green's business.

Urgent meetings were held with the Government in an attempt to resolve the matter. During these meetings Green and USF&G advised the Government that the default termination had been improper; and that if the Government pursued its indicated intention to set off the excess completion costs and liquidated damages under the Howard University contract against Green's FOB and Training School contracts, this action would make it financially impossible for Green to proceed with completion of these other contracts. Green and USF&G specifically stated to the Government that the inevitable result of any such set-off would be the forced abandonment of the FOB and Training School contracts and the destruction of Green's entire business.

In light of the above facts, Green and USF&G requested the Government to isolate the Howard University dispute and agree not to set off its contingent damage claims, liquidated and unliquidated, or excess completion costs against Green's other federal contracts. Green advised the Government that as long as there were no set-offs of Howard University claims against proceeds earned under the other contracts, it was willing and able to complete satisfactorily those contracts.

Although an agreement to isolate the Howard University dispute would not have prejudiced the Gov-

ernment because of the security afforded by the Howard contract balances and USF&G's performance bond, and despite the Government's full knowledge of the inevitable consequences of a decision to set off the Howard University claims, the Government nevertheless refused to agree not to set-off the disputed claims. The Government likewise refused petitioners' request to withdraw the Howard University termination notice and to modify the Howard University contract specifications, or interpretation thereof, in order to eliminate the elements of impossibility and the underlying dispute. As a result of the Government's action, Green was compelled to abandon the FOB and Training School contracts and was forced out of business.

Green promptly amended its Howard default termination appeal pending before the GSBCA to include claims for damages incurred for breach of the FOB contract and for those arising from the destruction of its business. The Government subsequently filed with the GSBCA a motion to dismiss the amended appeal for lack of jurisdiction on the ground that it was a claim for "breach of contract" and "unliquidated damages" and, as such, was "not redressable under any clause of the contract." By decision dated February 20, 1968, the Board of Contract Appeals granted the Government's Motion in part by dismissing that part of Green's claim for the damages which are the subject of the petition before this Court. The Board held that "we have no jurisdiction over that part of the appellants' claim which is for unliquidated damages for breach of contract as that is a so-called 'pure' breach of contract claim, i.e. a claim not redressable under a specific

contract provision. See *U.S.* v. *Utah Construction and Mining Company,* 384 U.S. 394; *Dean Construction Co., Inc.,* GSBCA-1050, 65-2 BCA para. 4888." *Wm. Green Constr. Co.,* 68-1 BCA ¶6883.

The Howard, FOB and Training School contracts were eventually completed by others than Green. The assuming contractor on Howard also found the structure impossible to build in accordance with the specifications and the Government then made the changes necessary to allow completion, which it should have done as a matter of law years before. Confronted with evidence of the most compelling kind, the Government on October 8, 1971, entered into a stipulation in which it admitted:

> "1. That the contractor was not in default at the time it received notice of the termination and the Government concedes the termination for default was erroneously made by the Contracting Officer. The appeal, therefore, should be granted as defined by the prior decisions of the Board in this case."

On the basis of the Government's admission of liability, the Board granted the appeal on October 13, 1971, and set aside the wrongful default termination of the Howard University contract. *Wm. Green Constr. Co.,* 71-2 BCA ¶9117. The Board's order stated in part:

> "The Board treats the Stipulation, in part, as the Government's admission that the contractor was not in default, within the meaning of the Default clause of the contract, at the time the contract was terminated for default. Accordingly, the Board finds that the appellant's right to proceed under the contract was improperly terminated for default."

Accordingly, the Board remanded the appeal to the contracting officer to determine Green's entitlement (i.e., equitable adjustment) for unreimbursed costs incurred in performing the Howard University contract. Recognizing the Board's earlier dismissal of Green's claim for damages which are the subject of the present petition, both the Government's stipulation and the Board's order provided:

> "That any equitable adjustment under the contract shall not be prejudicial to appellant's right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment."

At issue here is the question of the Government's responsibility for direct, natural, and foreseeable damages which the GSBCA held to be nonredressable under any specific contract clause, but which, nonetheless, are the direct and proximate result of the Government's breach of the Howard University contract and its anticipatory breach of the FOB and Training School contracts. This case is unique in that the result of the Government's wrongful termination of the Howard University contract coupled with its intransigence on the set-off question, was precisely as forewarned by Green and USF&G when they expressly advised the Government that the impending set-offs would render completion by Green of the FOB and Training School contracts financially impossible and that, therefore, Green would have no choice but to abandon work on those projects and cease business.

The direct, natural and foreseeable result of the Government's wrongful actions was to cause Green substantial losses. First, as a result of Green's forced

abandonment of the FOB contract the Government required USF&G, as surety for that contract, to complete performance and pay all valid and outstanding claims for labor and materials under that contract. The costs and losses thus incurred by USF&G totaled $870,969.59, for which Green, under its indemnity agreement, is liable to USF&G in the full amount. Second, by reason of the forced abandonment of the FOB and Training School contracts and the wrongful termination of the Howard University contract, which contracts represented more than one half of Green's total business, Green was deprived of the cash flow necessary to continue its business, its capital and credit were destroyed and it was forced to discontinue its business as a general contractor. This resulted in rendering Green unable to complete three other contracts which it was then in the process of performing. USF&G, as surety for those contracts, was required to complete performance and to pay all valid and outstanding claims for labor and materials under those contracts. The costs and losses incurred by USF&G on those contracts amounted to $948,753.44, for which Green under its indemnity agreement is liable to USF&G in the full amount. Finally, as a direct and provable result of the Government's breaches of contract, Green lost the full value of its business, which had a net worth of $890,334.26.[1]

As a result of the foregoing events, Green and USF&G filed their action in this case alleging breach of the Howard University contract (Count I) and anticipatory breach of the FOB contract (Count II).

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[1] The petitioners made no claim for anticipatory profits, and the Court of Claims erred on that fact in its opinion.

The Government filed a motion to dismiss in the Court of Claims, alleging among others, a failure by Green to exhaust its administrative remedies. This is a direct contradiction of the position the Government took on the same issues before the GSBCA, where it moved to dismiss these same issues because they involved a breach of contract and were not cognizable administratively under any provision of the contract. Thus, this case is in the posture of the Government's taking contradictory positions in different forums for its own advantage to the prejudice of the petitioners and being permitted to succeed with it. Before the Administrative Board, which has no jurisdiction over breach of contract issues, the Government said the issues are breach of contract claims not cognizable under the contract and the Board has no jurisdiction of the issues.[2] The GSBCA agreed and dismissed petitioners' claims which are the subject of the present action. *Wm. Green Constr.* Co., 68-1 BCA ¶6883. In the Court of Claims, which has no *de novo* jurisdiction of claims cognizable under the contract, the Government contended the issues were cognizable administratively under the contract and that Green was required to exhaust administrative remedies. In its opinion, the Court of Claims agreed and remanded the case back to the GSBCA.

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[2] The Government was most specific in its motion to dismiss before the GSBCA:

> "• • • [T]he Board does not have jurisdiction over all factual disputes, but only over those that have some reasonable bearing on a claim which is redressable under a specific contract provision • • •. [W]e submit that *Appellant's claim is not redressable* under any clause of the contract." (Emphasis added.)

REASONS FOR GRANTING THE WRIT

The Government has filed a petition for a writ of certiorari, No. 73-1153, to review the decision of the Court of Claims in this case. Green and USF&G have filed an opposition to the Government's position. However, this petition is filed to request review of the entire decision, including those issues decided adversely to Green and USF&G, in the event this Court should grant the Government's petition.

I. The Lower Court's Holding That There Is An Adequate Administrative Remedy Is Contrary To Established Law.

In *S&E Contractors, Inc.* v. *United States,* 406 U.S. 1 (1972), this Court held that "a citizen has the right to expect fair dealing from his Government * * * and this entails in the present context treating the Government as a unit rather than separate entities." 406 U.S. at 10. The question of whether Green had exhausted its administrative remedies is one that the Government could have raised at the administrative level. Since it chose not to do so, but chose instead to take the position before the administrative tribunal that the claims were breaches of contract not redressable administratively, the Government should not be allowed to raise an exhaustion of administrative remedies issue in the Court of Claims and the Court of Claims should not have remanded the case to the GSBCA. In doing so, the Court of Claims not only ignored the teaching of *S&E Contractors, Inc., supra,* but struck across its own holding in *Nager Electric Company* v. *United States,* 184 Ct.Cl. 390, 396 F.2d 977 (1968), which estopped the Government from claiming a failure to exhaust administrative remedies because the parties had characterized the claim before the Administrative Board

as a "breach" claim. This is exactly what occurred before the GSBCA in the present case. *Wm. Green Constr. Co.*, 68-1 BCA ¶6883. The unavailability and inadequacy of any administrative remedy was established by the GSBCA's decision and that satisfies the holding of this Court in *United States* v. *Anthony Grace and Sons*, 384 U.S. 424 (1966).

In treating the Howard and FOB contracts as tied together for purposes of set-off, and thus inextricably tying the wrongfulness of the Howard termination to the refusal to make progress payments under FOB, the Government should not be allowed now to change its position under any view of the case.

II. Adequate Administrative Remedies Were Not Available To The Contractor, So That The Court Of Claims Should Have Treated This Case As A Breach Of Contract Case.

When the Government breaches the payments clause of the contract, the contractor's traditional and judicially recognized remedy has been to abandon the contract and sue for damages.[3] This is exactly what Green did. Moreover, it is well understood law that the "disputes clause" does not extend to breach of contract claims "not redressable under other specific contract provisions." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966). There is no contract provision providing a remedy for the Government's repudiation of its payment obligation. This was specifically recognized by the Court of Claims in *Sanders Assoc.* v. *United States*, 191 Ct.Cl.

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[3] *Canal Company* v. *Gordon*, 73 Wall. 561 (1867); *Pigeon* v. *United States*, 27 Ct.Cl. 167 (1892); *Brooklyn & Queens Mfg. Co.* v. *United States*, 97 Ct.Cl. 532 (1942); *Valley Contractors*, 64 BCA ¶ 4071 (ASBCA 1964); *Pilcher, Livingston & Wallace, Inc.*, 70-1 BCA ¶ 8331 (ASBCA 1970).

7, 423 F.2d 291 (1970), where it held that a breach
the payments clause fell within the *Utah* excep-
on as not redressable under other provisions of the
ntract. Furthermore, that Court in *Universal Ecsco*
rp. v. *United States,* 181 Ct.Cl. 10, 385 F.2d 421
967) allowed a contractor to prosecute a claim for
each of the progress payment clause and rejected
e Government's contention that the claim was bar-
d by failure to exhaust administrative remedies.

By remanding the case to the GSBCA, the Court
Claims for the first time subordinated a breach of
e payments clause to the disputes clause of the
ntract. That result creates an open invitation for
e economic ruin of contractors and exposes them
duress of the utmost kind, for the common law
ght of contractors to abandon the work is now lost
d there is no other meaningful restraint upon an
use of bureaucratic power. This arises because the
sputes clause provides that "Pending final decision
a dispute hereunder, the contractor shall proceed
ligently with the performance of the contract and
accordance with the contracting officer's decision."
us, if the Government arbitrarily refuses to pay a
ntractor, the contractor is obligated under the dis-
tes clause to proceed with the work regardless of
at the Government has done, receiving only the
bious right to resort to administrative procedures
collect his money, which usually takes years. To
bject a breach of the payments provision to the
ministrative procedures of the disputes clause will
destructive not only of contractors but of the Gov-
ment's procurement processes, because few con-
ctors have the resources to perform work without
y or only partial pay and the endurance to engage

in a prolonged contest with the Government to collect it, and those which do would avoid doing business with the Government under such conditions or would contract with it only at exorbitant prices.

In an effort to provide some adjustment for the injustices sustained by the petitioners, the Court of Claims applied a termination for convenience concept to this case, and remanded it to the GSBCA for a convenience termination. But Green plainly was not in default and just as plainly the Government needed the completion of the contracted-for facilities. This raises for serious consideration by this Court the applicability for a termination for convenience clause in situations where (i) a contractor is not in default and (ii) the Government desires and needs the completion of the contracted for facilities. It would open the door to great mischief, if the Government can, under the guise of a termination for convenience clause, breach at will contracts that are not in default for facilities that it needs and which are completed subsequently by others.

III. The Government's Announcement That It Would Refuse To Make Progress Payments Was An Anticipatory Breach Of Contract.

The Court of Claims rejected Count II (App. 15a) which is based upon anticipatory breach of the FOB contract, as "a choice of phrasing to camouflage the irrefutable fact that the only detriment which came, or could come, to plaintiffs would be through a wrongful default-termination." The fact is that Green abandoned the FOB contract thereby terminating it as a viable agreement. The Court of Claims disregards the established law to achieve its

holding. The rule regarding anticipatory breaches of contract is firmly established and "a definite and unconditional repudiation of the contract by a party thereto, communicated to the others, is a breach of contract, creating an immediate right of action and other legal effects, even though it takes place long before the time prescribed for the promised performance and before conditions specified in performance have occurred." 4 Corbin, *Contracts* §959 at 852-53. In *United States* v. *Purcell Envelope Co.*, 249 U.S. 313, 320 (1919) this Court held that this doctrine applies fully to anticipatory repudiation of a contract by the Government. In that case, the Court, citing *Roehm* v. *Horst*, 178 U.S. 1 (1900), stated: "It is there decided that the positive refusal to perform a contract is a breach of it, though the time for performance has not yet arrived, and that liability for the breach at once occurs." *Id* at 320. Moreover, the Court of Claims has held that a Government refusal to make further progress payments constitutes an anticipatory breach creating an immediate cause of action. *Overstreet* v. *United States*, 55 Ct.Cl. 154 (1920); *Whitback* v. *United States*, 77 Ct.Cl. 309 (1933). The Court of Claims erred, therefore, in failing to apply the applicable law of anticipatory breach of contract.

V. The Measure Of Damages For Breach Of Contract Should Include Compensation for Provable, Foreseeable Consequential Damages, Contrary To The Court of Claims' Holding

The Court of Claims summarily dismissed all claims for consequential damages of Count I, holding that they were "too remote and consequential." This holding contravenes the established common law as

APPENDIX I

No. 124-72

IN THE UNITED STATES COURT OF CLAIMS

WILLIAM GREEN CONSTRUCTION COMPANY, INC.
Huntington, New York

and

UNITED STATES FIDELITY & GUARANTY COMPANY, Calvert & Redwood Street, Baltimore, Maryland,

Plaintiffs

v.

THE UNITED STATES OF AMERICA

Defendant

Petition

Stanley C. Morris, Jr., Attorney of Record, 1250 Connecticut Avenue, N.W., Washington, D.C., attorney for plaintiffs.

James V. Dolan, Michael Malley, Steptoe & Johnson, 1250 Connecticut Avenue, N.W., Washington, D.C., of counsel.

In The

UNITED STATES COURT OF CLAIMS

No. 124-72

WILLIAM GREEN CONSTRUCTION COMPANY, INC.
Huntington, New York

and

UNITED STATES FIDELITY & GUARANTY COMPANY, Calvert & Redwood Streets, Baltimore, Maryland,

Plaintiffs

v.

THE UNITED STATES OF AMERICA,

Defendant

PETITION

To the Honorable The Court of Claims:

1. This action arises under and jurisdiction is conferred by Title 28 U.S.C. § 1491.

2. Plaintiff William Green Construction Company, Inc., is a corporation organized and existing under the laws of the State of New York, with principal offices at Huntington, New York. At all times pertinent hereto, said plaintiff has been engaged in the general contracting and construction business and was duly licensed and authorized to do business in the District of Columbia and the other jurisdictions involved.

3. Plaintiff United States Fidelity & Guaranty Company is a corporation organized and existing under the laws of the State of Maryland with principal offices at Calvert and Redwood Streets, Baltimore, Maryland. At all times pertinent hereto, it was duly licensed and engaged in the business of executing and delivering surety bonds, including payment and performance bonds on federal and other

public construction contracts in the District of Columbia and elsewhere.

4. On or about November 25, 1964, William Green Construction Company, Inc., (hereinafter referred to as "Green") entered into a contract with the United States of America, through the General Services Administration, designated Contract No. GS-03B-14282, Project No. 49288, in the amount of $1,899,138.00, for the construction of Women's Residence Hall No. 7, Howard University, Washington, D.C.

5. At approximately the same time, Green entered into a contract with the United States of America, through the General Services Administration, designated as Contract No. GS-01-B-PCC-0234, in the approximate amount of $2,340,583.50, for the construction of the United States Post Office and Federal Office Building, Portsmith, New Hampshire.

6. On or about June 9, 1966, Green entered into a contract with the United States of America, through the General Services Administration designated as Contract No. GS-03B-14603, for the construction of the National Training School for Boys, U.S. Department of Justice, Bureau of Prisons, Morgantown, West Virginia.

7. At the times material hereto Green also had and was in the process of performing the following other contracts:

(a) Dutchess County Office Building, Poughkeepsie, New York ($1,904,698.96)

(b) Earth Science Building, Penn State, Pennsylvania ($1,868,075.37)

(c) Ossining High School, Ossining, New York ($2,207,521.73)

8. Pursuant to the requirement of the contracts and the law, Green, as principal, and United States Fidelity & Guaranty Company (hereinafter referred to as USF&G),

as surety, executed and delivered to the United States, as obligee, payment and performance bonds, guaranteeing satisfactory completion of the contract work and payment of all persons supplying labor and materials thereunder, for the above-mentioned contracts for the construction of Women's Dormitory No. 7, Howard University and the United States Post Office and Federal Office Building, Portsmith, New Hampshire. A similar payment and performance bond was executed by Green, as principal, and by another surety company, as surety, for the construction of the National Training School for Boys, Morgantown, West Virginia.

9. In the latter part of 1965 and the early part of 1966 a dispute arose over the cast-in-place architectural concrete (CPAC) work for the Women's Dormitory No. 7, Howard University contract. Green advised Defendant that the contract specifications for the CPAC work, as they were being interpreted and applied by Defendant and its architect, were defective and a practical impossibility to perform. The Defendant disagreed and by letter of April 14, 1966, Defendant, acting through its contracting officer, advised Green that its right to proceed with the contract for Women's Residence Hall No. 7, Howard University, was thereby terminated for default on grounds that Green allegedly had failed to proceed in accordance with that contract.

10. Defendant's termination of Green's right to proceed with the Howard University contract was improper and illegal and constituted a breach of that contract. A timely appeal from the decision of Defendant's contracting officer to terminate the contract was duly filed by Green with the General Services Administration Board of Contract Appeals.

11. Defendant's letter of April 14, 1966, terminating Green's right to proceed with the Howard University contract advised Green that it and its surety would be

held "liable for any increased costs and for liquidated damages at the rate of Two Hundred and Forty Dollars ($240.00) per calendar day until such reasonable time as may be required to complete the work." Defendant's letter further advised that the contract was then "only 13.5% complete" and that "the contract completion date is April 23, 1966." This meant that as of April 24, 1966, Defendant would charge Green with the liquidated damage assessment of $240.00 per day.

12. Following the aforesaid notice of default a series of conferences and meetings were held between representatives of Defendant, Green and USF&G during which Defendant was advised by representatives of Green and USF&G that (a) the termination of Green's Howard University contract was improper; (b) the cost of completing that contract, if it were to be relet to another contractor, would substantially exceed the undisbursed balance remaining under that contract; (c) if Defendant were to set off the liquidated damages and any excess completion costs under the Howard University contract against Green's other two contracts with Defendant, i.e., the Post Office and Federal Office Building, Portsmith, New Hampshire, and the National Training School for Boys, Morgantown, West Virginia contracts, as Defendant had indicated it would do, it would make it financially impossible for Green to proceed with completion of those contracts; and (d) the inevitable result of any such set-off would be the termination of Green's other two federal contracts which, in turn, would force Green completely out of business, because the set-offs would either effectively eliminate or materially diminish future progress payments under those contracts and greatly impair or destroy its credit with suppliers of materials and sources of loans from banks. Green did not have the capital resources to continue performing contracts of that magnitude without the unimpaired benefit of progress payments.

13. In light of the above facts, representatives of Green and USF&G requested Defendant to isolate the Howard University dispute and agree not to set-off any liquidated damage or excess-completion-cost claims arising out of that contract against the other two contracts between Green and Defendant. Green was willing and able to complete satisfactorily those other two federal contracts, if the Government would agree not to set-off its Howard University claim against the proceeds earned by Green while completing the contracts not in dispute.

14. An agreement not to set-off would not have prejudiced Defendant, since any claims which it might have under the Howard University contract were secured to the extent of $1,899,138.00 by USF&G's performance bond. Performance of Green's other two federal contracts was similarly secured by the payment and performance bonds for those contracts.

15. On April 28, 1966, Green wrote Defendant, through its Commissioner of Public Building Services, General Service Administration (Hon. Casper F. Hegner), stating as follows:

> Re: Women's Residence Hall No. 7—Howard University, Washington, D.C.
> Portsmouth Post Office & Federal Office Building, Portsmouth, New Hampshire
> National Training School for Boys, Morgantown, West Virginia
>
> Dear Sir:
>
> In accordance with conference held at the offices of the General Services Administration of April 27, 1966, in Washington, D.C., concerning the above projects, we are transmitting this letter to clarify our position concerning same.

This letter is being forwarded at your request and to set forth in some detail, certain proposals made by the parties at the above mentioned meeting.

The contractor, William Green Construction Co., Inc. agrees that it will continue performance pursuant to contract on the Post Office and Federal Office Building in Portsmouth, New Hampshire and the National Training School for Boys in Morgantown, West Virginia. This declaration of intention is given in view of previous discussions between our representatives and representatives of the G.S.A. and the United States Fidelity & Guaranty Company with particular reference to an unresolved claim for damages, submitted by the contractor in reference to the Howard University Dormitory contract.

The commitment is made on the condition that the G.S.A. agrees not to assert or set off any claims against the contractor which it may have or accrue in the future, not including claims or back charges on the Portsmouth or West Virginia projects, against monies earned or to become due on the West Virginia or Portsmouth projects.

Very truly yours,

WILLIAM GREEN, *Pres.*
Green Construction Co., Inc.

16. On May 3, 1966, USF&G, through its counsel wrote Defendant, through its Commissioner, Public Buildings Services, General Services Administration (Hon. Casper F. Hegner), stating:

Re: William Green Construction Co., Inc.
Project No. 49288
Women's Residence Hall No. 7
Howard University, Washington, D.C.

Dear Mr. Hegner:

On Wednesday, April 27, representatives from William Green Construction Company and USF&G, which is surety on two contracts of the Green Company with the Government, met with members of your staff. USF&G had asked for the meeting to learn the details of the controversy between the Green Company and the Government concerning Project No. 49288, involving construction of Women's Residence Hall No. 7, Howard University, Washington, D.C., which contract USF&G had bonded.

The Green Company has two other contracts with the Government. They are Portsmouth Post Office and Federal Office Building, Portsmouth, New Hampshire, which is also bonded by the USF&G, and National Training School for Boys, Morgantown, West Virginia, which is bonded by another surety.[1] We are advised by the Green Company that it intends to complete those contracts and we understand from the Government that it wishes to have them completed as expeditiously as possible.

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[1] The other surety company was not represented at the meeting on Wednesday. It should be understood that the interest of USF&G at that meeting and in this letter is confined solely to the contracts bonded by USF&G.

The controversy between the Green Company and the Government with regard to Howard University involves disputed issues of fact and the question of liability may not be determined for some time. However, if the Government off-sets its claims arising out of the Howard University contract against funds earned by the Green Company on other contracts, the Green Company will be unable to proceed with work on the contracts not in dispute for lack of funds to pay laborers and material-men.

It is apparent that if the contracts of the Green Company not in dispute are to be completed as the Government wishes, the controversy with respect to Howard University must be isolated and treated separately from the other contracts. Accordingly, we ask whether the Government will agree to confine off-sets of claims, past and prospective, to the respective contract of the Green Company out of which it arises—e.g. all claims with respect to Howard University will be confined to that contract—so that the Green Company may proceed with assurance that funds from contracts not in dispute, including retentions, will be available to pay for labor and materials incurred in the prosecution of the work.

Very truly yours,

/s/ Stanley C. Morris, Jr.
Local Counsel for UF&G

Copies of this letter were sent to the Contracting Officer and the other General Services Administration officials involved.

17. In view of the extremely serious consequences which would inevitably flow from Defendant's termination of Green's Howard University contract and a set-off of claims arising out of that termination against other Green con-

tracts, Defendant was requested by petitioner to withdraw its termination notice and to modify the Howard University contract specifications or its interpretation thereof to eliminate the elements of impossibility. This request was denied by Defendant.

18. By letter of May 12, 1966, Defendant, through its Commissioner, Public Building Service, General Services Administration (Hon. Casper F. Hegner), refused Plaintiff's request that the Howard University contract dispute be isolated from, and without set-offs against, Green's other contracts with Defendant. That letter stated in part as follows:

> "You request that we confine our right of set-off arising out of the defaulted Howard University contract solely to that contract although we have the right to set-off any claim against money due under any contract which Green has with the Government.
>
> "Needless to say we desire all GSA projects which Green has under contract to be completed expeditiously. We cannot, however, agree to waive any right of the Government in the absence of adequate consideration. You appreciate, of course, that no such consideration is included in your proposal."

19. Defendant's action in issuing its notice of default termination of Green's Howard University contract, in refusing to withdraw that notice and modify the contract requirements to make them possible to perform and in refusing to isolate the Howard University contract dispute from Green's other federal contracts was taken with actual knowledge that the proximate, inevitable and natural consequences of such action was (1) to make it impossible for Green to continue with performance of Post Office and Federal Office Building, Portsmouth, New Hampshire, and National Training School for Boys, Morgantown, West Virginia, contracts; and (2) by reason of the termination of those federal contracts, to force Green out of business, causing total loss of its net worth.

20. As a result of Defendant's action, it, in fact, became financially impossible for Green to continue with performance of its other two contracts with Defendant. Accordingly, on or about May 18, 1966, Green was forced to advise Defendant that because of the impending set-off of claims arising out of the Howard University dispute it was financially unable to proceed with performance of the contracts for the construction of the United States Post Office and Federal Office Building, Portsmouth, New Hampshire, and the National Training School for Boys, Morgantown, West Virginia. In light of this fact, Green's right to proceed with those latter two contracts was terminated.

21. As a direct result of the forced termination of Green's contract with Defendant for the Post Office and Federal Office Building at Portsmouth, New Hampshire, USF&G, as surety for that contract, was required to complete performance of that contract and to pay all valid and outstanding claims for labor and materials supplied in connection therewith prior to the date of termination. USF&G incurred costs and losses in this respect to the total amount of $870,969.59. Under its indemnity agreement and a judgment of the Supreme Court of New York, Green is liable to USF&G for the full amount of that loss.

22. As a direct, natural and foreseeable result of the Defendant's termination of the Howard University contract and the resulting termination of its other two contracts with Defendant, Green was deprived of the cash flow necessary to continue its business, its credit was destroyed and it was, accordingly, forced to discontinue its business as a general contractor. This resulted in a complete loss of the net worth of said company.

23. As a direct, foreseeable and inevitable result of the foregoing, Green was unable to complete its contracts for the construction of the Dutchess County Office Building, the Penn State University Earth Science Building and the Ossining High School. As a result of Green's inability to

complete those contracts, USF&G, as surety for those contracts, was required to complete performance thereof and to pay all valid and outstanding claims for labor and materials supplied thereunder. USF&G incurred costs and losses in this respect in the total amount of $948,753.44. Under its indemnity agreement and the judgment of the Supreme Court of New York, Green is liable to USF&G for the full amount of that loss.

24. As a further direct foreseeable and inevitable result of Defendant's action, as described above, and specifically as a result of Green's inability to continue in business and its losses under the above contracts, Green lost the full value of its business which as of April 30, 1964, had a net worth of $890,334.26.

25. Green's appeal to the General Services Administration Board of Contract Appeals from Defendant's wrongful default termination of its Howard University contract was perfected and duly docketed with the Board under Docket No. 2114. Appeal proceedings were temporarily continued pending reletting and completion of the Howard University contract by another contractor to determine whether those contract plans and specifications, as interpreted by Defendant, were, in fact, impossible of performance. The appeal proceeding culminated in a stipulation executed by Defendant and filed with the Board on October 8, 1971, which conceded, *inter alia*,

> "1. That the Contractor was not in default at the time it received notice of the termination and the Government concedes the termination for default was erroneously made by the contracting officer. The appeal, therefore, should be granted as defined by the prior decisions of the Board in this case."

Upon the basis of this stipulation, the Board on October 13, 1971, entered an order, granting the appeal and setting

aside the default termination for Green's Howard University contract, stating as follows:

> The Board treats the Stipulation, in part, as the Government's admission that the contractor was not in default, within the meaning of the Default clause of the contract, at the time the contract was terminated for default. Accordingly, the Board finds that the Appellant's right to proceed under the contract was improperly terminated for default.

26. The Board's order of October 13, 1971, remanded the case to the Contracting Officer for "equitable adjustment to compensate for such termination." However, pursuant to the Defendant's stipulation, it was understood and agreed:

> "4. That any equitable adjustment under the contract shall not be prejudicial to appellant's right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment."

27. As established by the Government's stipulation and the above-mentioned order of the General Services Administration Board of Contract Appeals, Defendant's default termination of Green's Howard University contract, coupled with Defendant's threat to set off claims based on that termination against Green's other contracts, constituted a breach by Defendant of Green's Howard University contract. As a natural, inevitable and foreseeable result of that breach, Green and USF&G, as its surety, sustained damages, which it is entitled to recover from Defendant, in the total amount of $2,710,057.29, computed as follows:

(a) Losses under United States Post Office and Federal Office Building Contract, Portsmouth, New Hampshire	$ 870,969.59
(b) Losses under other Green Contracts	$ 948,753.44
(c) Loss of value of Green's business	$ 890,334.26
TOTAL	$2,710,057.29

Green and USF&G also sustained substantial losses under the Howard University contract proper for which it is entitled to compensation. However, those losses are the subject of the pending equitable adjustment proceedings being conducted pursuant to the remand directed in the Order of the General Services Administration Board of Contract Appeals. Accordingly, those losses are severable from those claimed herein and are not involved in this suit at this time.

28. By virtue of its subrogation rights, as surety, arising out of its payments under its payment and performance bonds, and by virtue of the judgment obtained by it against Green in the Supreme Court of the State of New York, USF&G is subrogated to Green's rights of recovery against Defendant for the above losses and damages.

29. Other than the above-mentioned action before the General Services Administration Board of Contract Appeals, no other action has been had on the claim asserted herein by Congress or by any other Department of the United States Government. No persons other than Plaintiffs, Green's subcontractors and materialmen are owners of or have any interest in the claims asserted herein. Subject to the subrogation and other rights of the surety as set forth above, no assignment or transfer of this claim or any part thereof or interest therein has been made. Plaintiff's are justly entitled to the amount claimed herein from the United States, after allowing all just credits and off sets. Plaintiffs have at all times borne true allegiance for the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

Wherefore under Count I of this Petition, Plaintiffs demand judgment in the amount of $2,710,057.29, together with interest from May 12, 1966, plus costs and disbursements in this action, and for such other remedies as to this Court seem appropriate.

Count II

30. Under Count II of this Petition Plaintiffs repeat and reallege by reference each and every allegation set forth in paragraphs 1 through 29 above, as if fully restated herein.

31. Defendant's refusal on or about May 12, 1966, to isolate its dispute with Plaintiffs over the Howard University contract from Green's contracts with Defendant for the Post Office and Federal Office Building (Portsmouth, New Hampshire) and the National Training School for Boys (Morgantown, West Virginia) and its threat to set off against those latter two contracts any liquidated damage or excess completion cost claims under the Howard contract was, in effect, a threat not to make any further progress payments to Green for future work under the Post Office and Federal Office Building and the National Training School for Boys contracts. As such, Defendant's conduct constituted an anticipatory breach of Green's contracts for the Post Office and Federal Office Building and the National Training School for Boys.

32. As the natural, foreseeable and proximate result of Defendant's anticipatory breach of those contracts, Plaintiffs' sustained losses and damages under that contract and the other Green contracts bonded by USF&G in the amount of $1,819,723.03, as set forth in paragraphs 21-24 above.

33. As a further natural, foreseeable and proximate result of Defendant's anticipatory breach of those contracts, Green was forced to discontinue its general contracting business, resulting in additional loss and damages in the amount of $890,334.26.

34. As a result of Defendant's anticipatory breach of the United States Post Office and Federal Office Building contract and the National Training School for Boys contract, Plaintiffs are justly entitled to recover from De-

fendant in the total amount of $2,710,057.29, after allowing all just credits and off sets.

Wherefore under Count II of this petition, Plaintiffs demand judgment in the amount of $2,710,057.29, with interest thereon from May 12, 1966, plus costs and disbursements in this action, and/or such other relief as tc this Court may seem appropriate.

Respectfully submitted

/s/ Stanley C. Morris, Jr.
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223-4800
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APPENDIX II

IN THE UNITED STATES COURT OF CLAIMS

No. 124-72

(Decided May 11, 1973)

WILLIAM GREEN CONSTRUCTION COMPANY, INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY v. THE UNITED STATES

James V. Dolan, for plaintiff; *Stanley C. Morris, Jr.*, attorney of record. *Richard A. Behrens, Michael Malley* and *Steptoe & Johnson*, of counsel.

Judith Ann Yannello, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

On Defendant's Motion To Dismiss The Petition

DAVIS, *Judge*, delivered the opinion of the court:

Three separate government construction contracts are interlaced in this case. In November 1964 plaintiff William Green Construction Company (Green) agreed with the General Services Administration to build a women's residence hall at Howard University in the District of Columbia (the Howard University contract). About the same time Green also contracted with GSA to construct a Post Office and Federal Office Building in Portsmouth, New Hampshire (the FOB contract). A year and one-half later, the same agency arranged with plaintiff Green to erect the National Training School for Boys in Morgantown, West Virginia (Training School contract). Plaintiff United States Fidelity & Guaranty Company (USF&G) was the surety on the Howard University and FOB contracts; another company was surety on the Training School agreement. Green was also working, during this period, on three nonfederal projects on which USF&G was surety.

In 1965-1966, during performance of the Howard University work, the contractor and the defendant had a serious dispute whether certain of the government specifications were defective and impossible to carry out. When Green refused on that ground to go forward, the contracting officer terminated for default. Green challenged this determination, insisting that its inability to proceed was justified by the defects in the defendant's requirements.

In the discussions which followed, defendant indicated that it intended to set off, against amounts which would be owing on the other two of Green's federal contracts, the liquidated damages and excess completion costs assessable with respect to the just-terminated Howard University agreement. Green responded that such set-offs were improper—because the default-termination was unwarranted—and would make it financially impossible to proceed with completion of the other two contracts, and, more than that, the contractor's entire business would be destroyed. For this reason, Green and USF&G asked the GSA to isolate the Howard University dispute and not to impose set-offs, but the Government refused to make such a commitment.

Shortly after the Government had made it clear that it fully maintained its right of set-off, but before any set-off had actually occurred, Green informed GSA that, because of the threat to reduce payments on the other projects, it was financially unable to, and would not, proceed with the FOB and Training School contracts. These two agreements were then terminated by the Government for default. USF&G completed the FOB work, and apparently the other surety did the same for the Training School contract. Green likewise failed to complete the three nonfederal contracts it had, and went out of business.

Green appealed to the General Services Board of Contract Appeals from the default-termination of the Howard University contract, but it never sought review by the

Board of the defaults with respect to FOB and Training School. The Howard appeal asked, not only for the conventional modern adjustment for an improper default-termination,[1] but also for damages for losses on FOB and Training School, as well as on the nonfederal projects, and for loss of Green's business as a whole. Because of the inclusion of these items of recovery, the Government moved the board to dismiss the appeal as for "breach of contract" and "unliquidated damages", beyond the board's authority. In 1968 the board partially granted this motion, dismissing all claims except that for an equitable adjustment under convenience-termination standards.

Later, in 1971, the parties stipulated before the board that Green "was not in default at the time it received notice of the termination [of the Howard University contract] and the Government concedes the termination for default was erroneously made by the contracting officer. The appeal, therefore, should be granted as defined by the prior decisions of the Board in this case." The GSBCA then found that the contractor's "right to proceed under the contract was improperly terminated for default", and remanded to the contracting officer to determine the equitable adjustment for the unreimbursed costs of performing the Howard work. The stipulation expressly provided that "any equitable adjustment under the contract shall not be prejudicial to [the contractor's] right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment." GSBCA No. 2114, 71-2 BCA ¶ 9116.

In 1972 Green and USF&G brought this action, alleging what we have thus far set forth, asking for the large damages (over $2,700,000) the board had dismissed from the

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[1] The Howard contract provided that, if the default-termination was erroneous, the contractor would be entitled to an equitable adjustment—the equivalent to treatment as a convenience-termination. *See infra.*

Howard appeal, and claiming that those damages are recoverable on the theory that the United States breached all three of Green's federal contracts. Count I of the petition asserts the full claim as a breach of the Howard contract, while Count II bottoms the very same claim on alleged breach of the FOB and Training School agreements. Defendant has moved to dismiss the petition for failing to state any proper claim.

We think that the claimants do not have a "breach" claim against defendant on any of the three contracts, but that plaintiff Green does have a right to a convenience-termination type of equitable adjustment, under all three of them, and that such adjustments should be awarded administratively. We discuss the three agreements *seriatim*.

Howard University contract (Count I): The defendant's notice of default-termination of the Howard contract triggered the default-termination clause which provided that, if it was determined for any reason "that the Contractor was not in default under the provisions of this clause", or that "the delay was excusable", the matter was to be treated as a convenience-termination if the contract contained a convenience-termination article, and, if not, the contract was to "be equitably adjusted to compensate for such termination." We have held that the latter alternative calls for the general equivalent of a convenience-termination award. *General Builders Supply Co.* v. *United States*, 187 Ct. Cl. 477, 409 F.2d 246 (1969).

It follows that when the GSBCA determined that Green's right to proceed was wrongfully ended, and remanded for an appropriate adjustment, the contractor received the maximum to which it was entitled under the contract. There is no present complaint as to the amount of the equitable adjustment, and plaintiffs do not contend that such an award can or should cover the types of consequential damage they seek here. The petition suggests, however, that a

breach claim for a wrongful default-termination somehow survived for these additional items of recovery.

But it is very plain under our decisions that the administrative remedy is the only one available to the contractor. Green does not retain a "breach" claim, for an improper default, which can be brought in court and through which a supplemental award can be obtained. *See General Builders Supply Co., supra,* 187 Ct. Cl. at 480 n.3, 409 F. 2d at 248 n.3; *G. C. Casebolt Co.* v. *United States,* 190 Ct. Cl. 783, 786-87, 421 F. 2d 710, 712 (1970). The exclusive remedy "under the contract" substitutes for the "breach" claim which would otherwise exist, and becomes the claimant's sole form of relief. The measure of recovery for a convenience-termination—costs incurred, plus a reasonable profit on work performed—is an adequate replacement for the common-law cause of action. *See infra.*

It is worth noting, in addition, that in any event the type of consequential damage for which plaintiffs now press could not be obtained under Count I even if there were no such default-termination clause in the contract and this suit were properly one for common-law breach for wrongful cancellation of the Howard University pact. On the face of the petition it was not the wrongful termination itself which caused either Green's inability to proceed on the other two federal contracts, or the stoppage of work on the three nonfederal projects, or plaintiff's eventual going-out-of-business, but the subsequent and separate threat of set-offs against payments owing on the FOB and Training School projects. Whatever else those threats may have been, they were in no way violations of the Howard contract, nor were they directly or integrally linked to the Howard default termination. They were, instead, independent acts of the Government directed to the other two federal projects.

Accordingly, defendant is quite right that Count I fails to state any claim at all and must be dismissed *in toto.* The

equitable adjustment which Green is receiving, through the administrative proceedings, is all that it merits with respect to the Howard contract.

FOB contract (Count II): A. Even if the default-termination of the FOB agreement was invalid, Green should have appealed to the GSBCA, just as it sought review of the Howard termination. That was the channel expressly marked out by the contract and it should have been followed. If the FOB termination was improper, an equitable adjustment would be made under that contract which embodied the same default-termination form as the Howard agreement.

Plaintiffs try to avoid this conclusion by a number of arguments which we must reject. The first is that the claim in Count II is not for wrongful termination but for anticipatory breach of the FOB contract, through refusal to make progress payments. This is but a choice of phrasing to camouflage the irrefutable fact that the only detriment which came, or could come, to plaintiffs would be through a wrongful default-termination. Neither claimant suffered harm from the mere threat to withhold payment; neither would have suffered the harm charged from an actual withholding, if that is all there were. The injury could only come if the Government insisted that plaintiffs continued to have obligations under the FOB contract. If, for instance, the GSA had acquiesced (after the set-off threat) in Green's abandonment of the FOB project, the denial of progress payments would not interfere with performance because there would be no further work to be done or paid for. A failure to issue a default-termination would amount to an acquiescence in abandonment. *Cf. Ling-Temco-Vought, Inc.* v. *United States,* 201 Ct. Cl. —— (Mar. 1973). Thus, it was only the defendant's insistence, via the default-termination notice, that plaintiffs continued to have obligations under the FOB contract which precipitated any of the harms alleged. That was the heart of the matter.

As in *Allied Paint Mfg. Co.* v. *United States*, 200 Ct. Cl. ——, 470 F. 2d 556 (Dec. 1972), the contractor could have attacked the termination, through an appeal to the GSBCA, on the ground that other acts of the Government (*i.e.*, the threats of set-off) excused Green's failure to proceed.[2] Another comparable case is *Nolan Bros., Inc.* v. *United States*, 186 Ct. Cl. 602, 405 F. 2d 1250 (1969), in which we held that a convenience-termination subsumed and obviated an independent breach claim for defective design. We pointed out, in words directly applicable to the present case, "If the Government, as it might have done, had terminated the contract for default because plaintiff lagged (on account of the defective specifications) and the default was found excusable (as due to the defendant's own fault), the termination would be converted, under the default clause, into a convenience-termination * * *", with the plaintiff recovering costs incurred plus a measure of profit, but not unearned profits. 186 Ct. Cl. at 607, 609–10, 405 F. 2d at 1253, 1255. Plaintiff's so-called "breach" claim has, in short, no viability independent of the validity of the default-termination, and that could be readily challenged through the "disputes" procedure.[3]

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[2] In *Allied Paint Co.*, as here, the contractor's position was that the default-termination was improper because wrongful acts of the GSA in the administration of other contracts adversely affected the claimant's ability to perform all of its contracts, including those terminated.

[3] Plaintiffs complain that in order to obtain relief from the FOB and Training School defaults, they would have to show that the Howard default was improper—and "only under the Howard University contract could Green obtain the threshold determination (setting aside the Howard default) which was essential to obtaining any relief" under the other two agreements. But there was nothing to prevent Green from asking the GSBCA to suspend proceedings in the FOB and Training School cases to await the Howard determination. That is a very common practice where a significant issue in one matter depends upon the resolution of another case.

A second of claimant's positions is that the entire termination-and-disputes remedy was aborted before the default notice. In *Nolan Bros., Inc., supra,* 186 Ct. Cl. at 609 n. 5, 405 F. 2d at 1255 n. 5, we set apart "a case in which the contractor treats a government breach of warranty as ending the entire contractual relationship before the defendant attempts to exercise its right of termination." Plaintiffs say that that is what happened here—that the whole contract was effectively ended before the default-termination—but their current stance is conclusively refuted by the significant fact that USF&G undertook to complete the FOB project after the termination. If the contract was not subsisting at that time, neither Green nor USF&G would have been under any obligation; the existence of the contract was the essential predicate for the surety's agreement to complete. As in *Nolan,* we cannot see the plaintiffs had put an end to, or thought that they had put an end to, the contract before the Government invoked the default clause.

The third point is that the set-off threats constituted a cardinal change, by effectively deleting the progress payment provisions of the FOB contract, and that a cardinal change is redressable only in court, not administratively. *See Edward R. Marden Corp.* v. *United States,* 194 Ct. Cl. 799, 442 F. 2d 364 (1971). We do not agree that it is a contract change of any kind—cardinal or ordinary—for the Government to set-off against progress payments (let alone merely threatening to set-off) a federal claim on another contract (with the same contractor) which is believed in good faith, but mistakenly, to be valid. This is simply an exercise of the established right of set-off (*see United States* v. *Munsey Trust Co.,* 332 U.S. 234 (1947); *Burlington Northern Inc.* v. *United States,* 199 Ct. Cl. , 462 F. 2d 526 (July 1972)), which is not transformed into something else because the defendant's claim turns out later to be without merit.

In any event, and assuming for argument's sake that the threats of set-off did equal a cardinal change excising the progress-payment provisions, it does not follow that such a "breach" claim would be any different from the "breach" claim in this case for simple violation of the progress-payments clause. As we have pointed out, that claim is swallowed up by the default-termination which was the event causing plaintiffs' detriment. Violation of the payments article, or even its deletion, would not have brought about the chain-of-events asserted by Green and USF&G if it were not for the default-termination. From claimants' viewpoint that was the real villain in the drama, whom they should have pursued on his own scene.

Lastly, we are told that an equitable adjustment of the convenience-termination type does not give full enough relief for the injuries suffered, and therefore plaintiffs should be allowed to seek, through this court, the part of the remedy which the administrative award cannot give them. The answer is that the premise is incorrect. "The only substantial difference between the sum calculated under" equitable adjustment or convenience-termination standards "and the amount recoverable in a common law action for contract breach is the non-inclusion in the former of anticipated but unearned profits." *Nolan Bros., Inc.* v. *United States, supra,* 186 Ct. Cl. at 607, 405 F. 2d at 1253. This exclusion from relief of unearned profits is a settled policy which has long been accepted and enforced. 186 Ct. Cl. at 608-09, 405 F. 2d at 1254-55; *General Builders Supply Co.* v. *United States, supra,* 187 Ct. Cl. at 485–86, 409 F. 2d at 251; *G. C. Casebolt Co.* v. *United States, supra,* 190 Ct. Cl. at 788, 421 F. 2d at 713. And even in a common-law suit there would be no recovery for general loss of business, the claimed loss of the entire Green net worth, and losses on the non-federal work—such damages are all deemed too remote and consequential. *See Ramsey* v. *United States,* 121 Ct. Cl. 426, 433-35, 101 F. Supp. 353 357–58 (1951), *cert. denied,* 343 U.S. 977 (1952); *Dale*

Constr. Co. v. *United States,* 168 Ct. Cl. 692, 738 (1964); *Specialty Assembly & Packing Co.* v. *United States,* 174 Ct. Cl. 153, 175, 355 F. 2d 554, 567–68 (1966). The conclusion must be that the administrative remedy is, as we have already said, a full and permissible substitute for the award of damages under the former "breach" claim.

Plaintiffs err therefore in seeing themselves as under no duty to proceed administratively. On the contrary, Green should have appealed from the default-termination of the FOB contract and obtained its relief in that fashion.

B. Not unexpectedly, the defendant suggests that, having failed to appeal, Green is now barred forever. We follow, instead, the rule of *Zidell Explorations, Inc.* v. *United States,* 192 Ct. Cl. 331, 335–36, 427 F. 2d 735, 737–38 (1970), that, if the circumstances warrant, we will give a contractor who has failed to appeal a second chance. The time-limit for appeals to contract appeals boards is not beyond enlargement (*Maney Aircraft Parts, Inc.* v. *United States,* 197 Ct. Cl. 159, 453 F. 2d 1260 (1972); *Monroe M. Tapper & Associates* v. *United States,* 198 Ct. Cl. , 458 F. 2d 66 (April 1972)), and the Act of August 29, 1972, Pub. L. No. 92–415, 86 Stat. 652, gives us power to remand to a board "with such direction as it [the court] may deem proper and just."

To our mind this is a case, like *Zidell,* in which we should not rigidly hold the contractor to its original decision not to appeal. The three federal contracts were linked in plaintiff's mind and it may have considered the enlarged recovery it originally sought in the Howard administrative proceedings to be a sufficient method of covering all three determinations.[4] Then, too, plaintiff may well have been misled by its view, still strenuously espoused here, that

[4] The FOB and Training School contracts were terminated in 1966. It was not until 1968 that the GSBCA dismissed, from the Howard appeal, the claims relating to the other two contracts. By that time the time for appealing the FOB and Training School defaults had long expired.

its claims are entirely "breach" claims for court trial. We referred in *Zidell* to the great confusion since *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), over which cases properly fall "under the contract" and which are for "breach". This case is a prime exemplar. Especially since plaintiffs appear to have a valid right to substantial further relief, they should not be eternally punished for their initial mistaken choice of procedure.[5] The case should go to the GSBCA for processing under the default-termination clause of the FOB contract.

c. There has, as yet, been no decision that the termination of the FOB agreement was improper, but we think that on the undisputed facts there is no doubt that it was, and we now so hold as a matter of law since the board could not validly decide otherwise. All must now accept the Howard termination as incorrect; Green was not in default on that project and the default-termination was erroneously made by the contracting officer. There were, accordingly, no liquidated damages and no excess construction costs which could properly be offset against the FOB and Training School contracts. That threats to offset were nevertheless made is undisputed and indisputable. The connection is also clear between those threats and Green's stopping work on the FOB and Training School projects. Defendant does not even hint that this stoppage was unrelated to, or had some cause other than, the menace of set-off.[6] Nor is there any suggestion that plaintiffs are mistaken when they say they warned the defendant that

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[5] The cases in which we refused contractors a second choice—*Briscoe* v. *United States*, 194 Ct.Cl. 866, 887-88, 442 F.2d 953, 966 (1971); *Richardson Camera Co.* v. *United States*, 199 Ct.Cl. , 467 F.2d 491 (Oct. 1972)—presented very different facts and circumstances.

[6] The petition reproduces a letter from Green committing it to continue performance on the FOB and Training School contracts provided that GSA agreed not to offset claims unrelated to those two projects.

they would need the progress payments on the two contracts, without substantial diminution.[7] There is, moreover, not the slightest basis for thinking that Green should (or could) have gotten the necessary money from other sources.

It follows, we think, that Green's refusal to proceed on FOB must now be held to be excused. A serious threat in these circumstances to withhold necessary progress payments because of an erroneous off-set claim on another contract is an act of the Government, not attributable to the contractor, which excuses whatever technical default there may be. Construction contractors cannot be expected to continue working if the Government improperly holds back on substantial interim payments which enable the project to proceed. *Cf. Litchfield Mfg. Corp.* v. *United States,* 167 Ct. Cl. 604, 338 F. 2d 94 (1964); *Pigeon* v. *United States,* 27 Ct. Cl. 167, 175-76 (1892); *Overstreet* v. *United States,* 55 Ct. Cl. 154, 173–74 (1920).[8]

D. The equitable adjustment to which Green is entitled under the FOB contract includes, not only the costs it incurred itself before termination, but also USF&G's excess costs in completing the project. Defendant admits[9] that,

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[7] The petition sets forth a pre-termination letter from counsel for USF&G to GSA saying explicitly that "if the Government off-sets its claims arising out of the Howard University contract against funds earned by the Green Company on other contracts, the Green Company will be unable to proceed with work on the contracts not in dispute for lack of funds to pay laborers and materialmen."

[8] Green might have waited until a set-off was actually made, but the GSA's intention had been made very plain and there apparently was planning and preparation work to do which would be entirely wasted if plaintiffs were not going forward once a set-off was actually made. In the circumstances we do not think Green was compelled to await an actual set-off.

[9] See Defendant's Reply to Plaintiffs' Response In Opposition to Defendant's Motion to Dismiss, at 9 n.6.

when a default-termination is converted to a convenience-termination, the contractor is entitled to any liquidated damages and reprocurement costs paid following the termination. That would include, since the surety stands here in the contractor's place,[10] USF&G's unreimbursed excess completion costs, if appropriate and reasonable. *Cf. J. D. Hedin Constr. Co.* v. *United States*, 197 Ct. Cl. 782, 790–803, 456 F. 2d 1315, 1320–27 (1972). The equitable adjustment called for by the contract is flexible enough to cover that item, to the extent the contractor has incurred such costs as a result of the wrongful termination.

On the other hand, as we have already indicated, USF&G's costs of completing the three non-federal contracts, and the loss of Green's net worth, are not proper items for an equitable adjustment under the FOB and Training School contracts.

Training School contract (Count II): What we have said as to the FOB contract controls the Training School agreement. USF&G was not surety for that work and the petition therefore does not ask for recovery of amounts expended by the other surety (which is not a plaintiff here). But if the other surety has a claim, through Green, with respect to completion of FOB, the Training School equitable adjustment should take account of it if presented.

Defendant's motion to dismiss the petition is fully granted as to Count I, but as to Count II the court makes the following disposition: (a) the petition is dismissed to the extent that a claim for "breach" of the FOB and Training School contracts, triable in court, is stated; (b) the petition is construed as alternatively seeking equitable ad-

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[10] USF&G has paid all laborers and materialmen, and Green is liable to USF&G for the full amount of the loss suffered in completing the FOB contract.

justments under those two contracts;[11] and (c) the request for such equitable adjustment is remanded to the GSBCA under P.L. 92–415, this opinion, and General Order No. 3 of 1972, for appropriate administrative proceedings. Counsel for the plaintiffs is designated as the responsible reporting attorney under paragraph 9(a) of General Order No. 3.

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[11] Count II demands, in the alternative, "such other relief as the court may deem appropriate."

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS

No. 124-72

WILLIAM GREEN CONSTRUCTION COMPANY, INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY

v.

THE UNITED STATES

Before Cowen, *Chief Judge,* Davis, Skelton, Nichols, Kashiwa, Kunzig and Bennett, *Judges.*

Order

This case comes before the court on plaintiffs' motion, filed June 11, 1973, for a rehearing and partial reconsideration and on defendant's motion, filed June 18, 1973, for clarification, modification and reconsideration of the court's opinion issued May 11, 1973. Upon consideration thereof, together with the responses in opposition thereto, without oral argument.

It is ordered that the slip opinion entered herein on May 11, 1973, be and the same is amended and modified in that footnote 10 appearing on page 11 of the slip opinion is stricken and deleted and the following is inserted in lieu thereof:

> "[10] Plaintiffs allege, and the defendant has not denied, that USF&G has paid all laborers and materialmen. We proceed, at this stage, on that assumption. It is clear that Green is liable to USF&G for the full amount of the loss suffered in completing the FOB contract."

It is further ordered that, except for the above modification and amendment of the said slip opinion, no further modification or amendment is to be made and the plaintiffs' motion, filed June 11, 1973, and defendant's motion, filed June 18, 1973, be and the same are denied.

BY THE COURT

/s/ WILSON COWEN
Chief Judge

APR 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1153

UNITED STATES OF AMERICA, *Petitioner,*

v.

WILLIAM GREEN CONSTRUCTION CO., INC. *et al.*
Respondents.

No. 73-1314

WILLIAM GREEN CONSTRUCTION CO., INC. *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENTARY BRIEF OF PETITIONER IN NO. 73-1314 AND RESPONDENT IN NO. 73-1153

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SUPPLEMENTARY BRIEF OF PETITIONER IN NO. 73-1314 AND RESPONDENT IN NO. 73-1153

Pursuant to Rule 24(5), Respondent in No. 73-1153 and Petitioner in No. 73-1314, respectfully calls the Court's attention to the case of *National Factors, Inc.* v. *United States,* Court of Claims No. 93-63, decided March 20, 1974.

In that case, the Court of Claims decided that:

> the termination of a contract for the convenience of the government is valid only in the absence of bad faith *or a clear abuse of discretion.* Slip op. at 4 [emphasis added].

The clear implication of this holding is that where the Government's termination of a contract is a clear abuse of discretion, there is a breach of contract over which the Court of Claims has *de novo* jurisdiction under *United States* v. *Anthony Grace & Sons,* 384 U.S. 424 (1966). The *National Factors* decision is important to the disposition of the two petitions before this Court because it highlights the fact that, under normal doctrines of Government contract law, a clear abuse of discretion cannot be used to convert a wrongful termination into a termination for the convenience of the Government. A wrongful termination in such a case remains what it has always been: a breach of contract redressable only in the Court of Claims.

Green's opposition to the Government's petition in No. 73-1153 points out that there are independent grounds for supporting the Court of Claims' disposition. One of those grounds is that the Court of Claims should have completely denied the Government's motion to dismiss, because Green's petition on its face alleges a breach of contract to which the doctrine of exhaustion of administrative remedies is inapplicable, (Brief in opposition at 14). The facts alleged in Green's complaint in the Court of Claims in this case are sufficient to require a finding that the Government's action resulting in termination of the FOB contract was a clear abuse of discretion and thus is a breach of contract. Specifically, it was alleged that the Government was told that Green would complete FOB, which was

guaranteed by USF&G's performance and payment bonds and that the Government was warned that a set-off of its Howard contract claim against the FOB contract would inevitably bankrupt Green and result in abandonment of the FOB contract.

In its cross-petition in No. 73-1314 which is conditioned upon this Court's action on the Government's petition, Green seeks direct review of that portion of the Court of Claims' opinion rejecting Green's breach of contract claim. That petition contends that the concept of termination for the convenience of the Government cannot and should not be stretched so far as to cover cases (such as FOB) where the contract is not in default, the Government wants, indeed, demands, completion of the contract, and the Government itself acts in such a fashion as to make completion impossible. In *National Factors, supra,* the Court of Claims now appears to have recognized this principle in holding that a breach claim was maintainable in that case. For that reason Green wishes to bring this recent decision of the Court of Claims to this Court's attention.

Respectfully submitted,

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April 23, 1974

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FILED

MAY 8 1974

No. 73-1314

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM GREEN CONSTRUCTION CO., INC. AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS

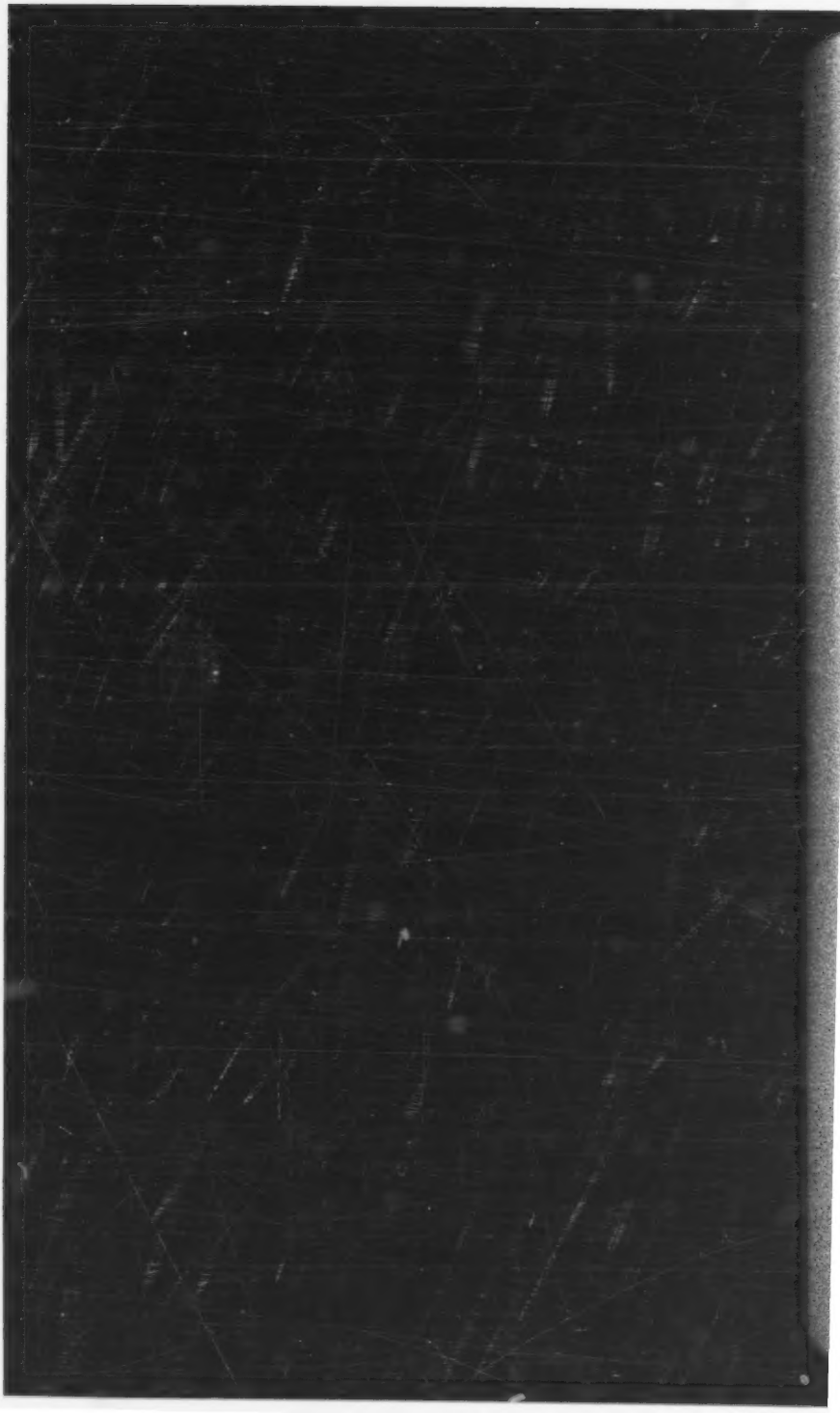
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1314

WILLIAM GREEN CONSTRUCTION CO., INC AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The government, on January 26, 1974, filed a petition for a writ of certiorari (No. 73-1153) to review the judgment of the Court of Claims in this case. The respondents, William Green Co. and United States Fidelity and Guaranty Company, its surety, (collectively referred to as "Green") filed a cross-petition for a writ of certiorari stating that the cross-petition is "conditional" upon the granting of the government's petition for certiorari (Cr. Pet. 1).[1] This memorandum is filed in opposition to Green's petition.

The relevant facts are stated at pp. 2-9 of the government's petition for a writ of certiorari in No. 73-1153.

[1] "Cr. Pet." designates the cross-petition.

1. Green contends that the government was estopped, in the Court of Claims, from seeking dismissal of Green's damage claim for losses on the FOB and Training School contracts. The estoppel arises, Green maintains, because the government acted inconsistently in moving to dismiss Green's petition in the Court of Claims for Green's failure to exhaust its administrative remedies, when the government itself had obtained a previous dismissal of Green's administrative claims (Cr. Pet. 13-14).

Green's allegation that the government acted inconsistently is without merit. Green's administrative claim challenged the termination of a different contract—the Howard agreement. By its Amended Notice of Appeal under the Howard contract, filed with the General Services Board of Contract Appeals ("the Board") on July 27, 1966, Green alleged, *inter alia* (p. 21):

> It is the position of the contractor that the Government, among other things, has wrongfully terminated the contract and, as a consequence thereof, the contractor has suffered consequential damages extending beyond the contract. The Board, however, does not have jurisdiction to decide issues of breach of contract and award damages therefor.

Although Green now contends that this claim for consequential damages included claims arising out of the FOB and Training School contracts, there is no reference to either of these contracts in the Amended Notice of Appeal.[2] Green acknowledged in its Amended Notice of

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[2]Likewise, the January 31, 1968, letter from Green to the Board referred to in the Board's opinion, in which Green stated that part of the damages Green was seeking were for breach of contract, contained no reference to either the FOB or the Training School contracts. *Appeal of William Green Construction Co.*, 68-1 BCA Para. 6883, at p. 31,797.

Appeal (*supra*) that the Board in the Howard appeal was limited to the remedies provided in the Howard contract (costs incurred on the Howard project plus a measure of profits on work performed, but not unearned profits) and that the Board could not entertain claims for breach of contract.[3] Moreover, even if Green had directly challenged the default terminations of the FOB and Training School contracts in its Amended Notice of Appeal, a motion to dismiss such claims as untimely would have been appropriate because Green's Amended Notice of Appeal was not received by the Board until after the expiration of the 30-day period within which an administrative appeal may be filed.[4] The Board therefore properly dismissed the breach of contract claims on the government's motion.

Accordingly, there was nothing inconsistent in the government's subsequent motion in the Court of Claims to dismiss Green's claims for breach of the FOB and Training School contracts. Green's remedies, if any, were available administratively pursuant to the provisions of the contracts, but only in the event Green had advanced its claims in a timely manner. This it did in the case of the Howard default termination; however, with respect to the FOB and Training School contracts, no administrative appeals were ever timely

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[3]It is clear that the standard disputes clause contained in the Howard contract does not vest a Board of Contract Appeals with jurisidction to hear and decide breach of contract claims not redressable under other specific contract provisions. *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 .

[4]Green's Amended Notice of Appeal was dated July 26, 1966, and was received by the Board on July 27, 1966, more than 30 days after the receipt by Green of both the May 23, 1966, default notice on the FOB contract and the June 9, 1966, default notice on the Training School contract.

filed. Therefore, the government was not precluded from asserting before the Court of Claims that Green's claims on the FOB and Training School contracts were barred due to Green's failure to exhaust the available adminstrative remedies. Indeed, one of the principal grounds upon which the government has sought certiorari is that the Court of Claims allowed Green to seek an administrative remedy when the time for such an appeal has long since expired.

2. There is also no merit to Green's contention that the administrative remedy is inadequate. The crux of Green's argument is that a government contractor who has been wrongfully unpaid must nonetheless complete the project in order to obtain his administrative remedy (Cr. Pet. 14). This assertion is incorrect. As the court below noted, Green could have discontinued the project, and upon the formal entry of a default termination, Green "could have attacked the termination, through an appeal to the GSBCA * * *" (Cr. Pet. App. 23a). In the event Green had prevailed in those proceedings, it would have recovered "costs incurred plus a measure of profit, but not unearned profits * * *" (Cr. Pet. App. 23a). There was, therefore, an ample and expeditious administrative remedy available to Green, which it unjustifiably failed to pursue. Nor is there any merit to Green's assertion (Cr. Pet. 16) that the alleged refusal by the government to make further progress payments constituted an 'anticipatory breach' of the contract which would give Green a right to sue in the Court of Claims. As the Court of Claims noted, this "current stance is conclusively refuted by the significant fact that [the surety (one of the petitioners herein)] * * * undertook to complete the FOB project after termination" and "the existence of the contract was the essential predicate for the surety's

agreement to complete" (Cr. Pet. App. 24a).[5] As we noted above, Green had the right under the contract to an administrative remedy for the losses it sustained as a result of the government's allegedly improper action, and it was obliged to pursue that remedy. See, *United States* v. *Anthony Grace & Sons,* 384 U.S. 424; *United States* v. *Holpuch Co.,* 328 U.S. 234.[6]

3. Nor is the administrative remedy, in the form of a convenience termination, inadequate because it will not afford Green recovery of its unearned profits and

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[5]The surety on the Training School contract also assumed the responsibility for the completion of that contract. It should be noted that a default termination does not constitute a termination of the contract, but merely terminates the contractor's right to continue performing the contract. Thus, in instances where a contract has been default terminated, claims by the government for excess reprocurement costs are considered to be claims "under the contract" and thus subject to a contracting officer's final decision which may be appealed to a contract appeals board. *E.g., Astro-Space Laboratories, Inc.* v. *United States,* 470 F. 2d 1003(Ct. Cl.)

[6]The decision of the Court of Claims in *National Factors, Inc.* v. *United States,* No. 93-63, decided March 20, 1974 (Supplementary Brief of Petitioner in No. 73-1314 and Respondent in No. 73-1153) is not a new matter intervening since Green's last filing. On March 19, 1971, the Court of Claims held that National Factors' allegations of bad faith were sufficient to sustain the petition against a motion for summary judgment. The March 20, 1974, decision is simply a ruling on the admissibility of evidence with respect to a petition already held sufficient. While we believe that the position of the Court of Claims in *National Factors* is erroneous, we also believe the case is distinguishable. There the principal issue is whether bad faith can convert a convenience termination into a breach of contract. Here, where the default termination was requested by Green, there can be no suggestion that the default termination itself was in bad faith. Moreover there is no allegation that the government's refusal to waive its right to set-off (which allegedly caused Green to abandon its projects) was made in bad faith.

damages for the loss of its entire business. As the Court of Claims stated:

> "The only substantial difference between the sum calculated under" equitable adjustment or convenience-termination standards "and the amount recoverable in a common law action for contract breach is the non-inclusion in the former of anticipated but unearned profits." *Nolan Bros., Inc.* v. *United States, supra,* 186 Ct. Cl. at 607, 405 F. 2d at 1253. This exclusion from relief of unearned profits is a settled policy which has long been accepted and enforced. 186 Ct. Cl. at 608-09, 405 F. 2d at 1254-55; *General Builders Supply Co.* v. *United States, supra,* 187 Ct. Cl. at 485-86, 409 F. 2d at 251; *G.C. Casebolt Co.* v. *United States, supra,* 190 Ct. Cl. at 788, 421 F. 2d at 713. And even in a common law-suit there would be no recovery for general loss of business, the claimed loss of the entire Green net worth, and losses on the non-federal work—such damages are all deemed too remote and consequential. See *Ramsey* v. *United States,* 121 Ct. Cl. 426, 433-35, 101 F. Supp. 357-58 (1951), *cert. denied,* 343 U.S. 977 (1952); *Dale Constr. Co.* v. *United States,* 168 Ct. Cl. 692, 738 (1964); *Specialty Assembly & Packing Co.* v. *United States,* 174 Ct. Cl. 153, 175, 355 F. 2d 554, 567-68 (1966). The conclusion must be that the administrative remedy is, as we have already said, a full and permissible substitute for the award of damages under the former "breach" claim. [Cr. Pet. App. 25a-26.]

Moreover, Green bases its alleged entitlement to these damages on the fact that, at the time the government's procurement officials took their allegedly wrongful action against Green (advising it that the right to set-

off would not be waived), Green had informed the government's officials of the far-reaching consequences of their decision (Cr. Pet. 17-18). However, the only recoverable damages are those that are foreseeable at the time of the making of the contract, not those which may become foreseeable at the time of the alleged breach. *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U.S. 540, 544; *Hadley* v. *Baxendale*, 9 Exch. 341 (1854); A.L.I., *Restatement of the Law of Contracts*, §§ 330-331 (1932); 11 *Williston On Contracts*, §§ 1356-1357 (3d ed. 1968).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.